No. 80-699

In the Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH M. WELLS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether the decision below correctly held that the cost of certain luncheons and dinners paid for by petitioner and a portion of his country club dues were not deductible by him as ordinary and necessary expenses of his trade or business.

The pertinent facts may be summarized as follows: During the year in issue (1973), petitioner was employed as the Public Defender of Sacramento County, California. The incumbent of that office is a state civil servant compensated by a fixed salary. Petitioner supervised a staff consisting of a deputy public defender, six supervising attorneys, up to 33 staff attorneys, one supervising investigator and clerical personnel, all of whom were likewise employed under the state civil service system (Pet. App. A-2, A-3; I-R.

16-17; II-R. 11-16, 21-22).[1] Petitioner was a member of the Del Paso Country Club, a dining and golf facility, and during 1973, took approximately eight staff members to the club for lunch each month. One purpose of the luncheons was to discuss matters of concern to the Office of the Public Defender, such as developing policies for supervisors, adopting uniform pleadings and methods for controlling case load, development of status reports regarding cases in the office and the like. Attendance at the luncheons was voluntary. During the year in issue, no staff meetings were held other than these luncheons, although a conference room was available for such purpose in petitioner's office building. On two or three occasions during the year, petitioner also tok members of his staff and their spouses and friends to the club for dinners and drinks. While the County of Sacramento reimbursed its employees for business expenses incurred in carrying out their official duties, expenses of the type here in issue were not reimbursable (Pet. App. A-2 to A-3; I-R. 16-17; II-R. 11-16, 21-22, 24-30).

On his 1973 income tax return, petitioner claimed business expense deductions of $1,236.20, representing the cost of these luncheons and dinners, and $408 of the $624 paid as dues for membership in the Del Paso Country Club. On audit, the Commissioner disallowed these deductions. The Tax Court upheld the Commissioner's determination on the ground that, while the expenses might have resulted in some benefit to the Office of the Public Defender, they were not ordinary and necessary expenses of petitioner's own trade or business as the publicly employed supervisor of that office (Pet. App. A-9 to A-12).[2] The court of appeals affirmed (Pet. App A-4).

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[1]"I-R." and "II-R." refer to the two-volume duplicated record in the court of appeals.

[2]The Tax Court also sustained the Commissioner's disallowance of petitioner's club dues (Pet. App. A-14). Section 274(a)(1)(B) of the

1. The decision below correctly disallowed petitioner's deduction of his entertainment expenses. Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.) permits as a deduction "the ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business * * *." The determination of what expenses are ordinary and necessary is factual and necessarily turns on the facts and circumstances of the case. The burden is on the taxpayer to prove the validity of his claimed deductions. *Pacific Grains, Inc.* v. *Commissioner*, 399 F. 2d 603 (9th Cir. 1968); *Gilman Paper Co.* v. *Commissioner*, 399 F. 2d 697 (2d Cir. 1960). The courts of appeals are obliged to affirm such factual determinations, unless they are clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291 (1960).

Petitioner's status as an employee of the County of Sacramento, compensated by a fixed salary, is similar to that of a corporate officer. It is settled that, for tax purposes, such a salaried corporate officer is engaged in a trade or business separate and distinct from that of his corporation, *i.e.*, the business of rendering services for compensation. *Fischer* v. *United States*, 490 F. 2d 218 (7th Cir. 1973); *Noland* v. *Commissioner*, 269 F. 2d 108, 111 (4th Cir.), cert. denied, 361 U.S. 885 (1959); *Folker* v. *Johnson*, 230 F. 2d 906, 908-909 (2d Cir. 1956). Thus, Section 162(a) allows

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[2]Internal Revenue Code (26 U.S.C.) provides that in order to obtain a business deduction of any part of the cost of dues paid to a country club, the burden is on the taxpayer to prove that more than 50% of the total calendar days of use f the facility was for business purposes. Petitioner relied on his use of the club for the staff luncheons and dinners to show primary business use. But since the court held that these expenditures failed to meet the business purpose test, they could not be used to meet the 50% test of Section 274(a)(1)(B). Likewise, since the court of appeals affirmed the Tax Court on the first issue, it found it unnecessary to address the dues issue separately.

a deduction by a corporate employee for expenditures which are "ordinary and necessary" to the continuation of his own business of earning his pay. If, on the other hand, a corporate employee voluntarily pays expenses attributable to and for the benefit of the business of his corporation, he may not deduct them on his personal tax return. *Noland* v *Commissioner*, 446 F. 2d 926, 928-929 (8th Cir. 1971).

Petitioner's trade or business was that of rendering services to the County of Sacramento for the compensation of a fixed salary. Accordingly, he bore the burden of showing that the expenses incurred in taking members of his staff to lunch and dinner were proximately related to that business. Petitioner, however, has never alleged that his purpose in incurring these expenditures was to advance or protect his position as a salaried employee. He stressed, instead, throughout his testimony and on brief before the court below that the purpose of the luncheon meetings was to further the business of the Public Defender's office (Br. 5-9, 17-18). Thus, the expenditures bore no relationship to his own business, but rather, were for the exclusive benefit of the "Office of Public Defender," a business that is separate and distinct from petitioner's business. As the Seventh Circuit pointed out in *Fischer* v. *United States, supra*, 490 F. 2d at 221, "* * * where a corporate executive employee undertakes to discharge the responsibility of the corporation, he is not incurring an expenditure of *his* trade or business within the meaning of Section 162" (emphasis in original).

2. Petitioner contends, however, that the real issue in this case is whether the position of the Public Defender is an ordinary civil service position or whether it is an independent law office receiving funds from County government" (Pet. 14-15). As he views the matter (Pet. 19-20), the Tax Court based its decision on the premise that he was a "usual civil servant" (Pet. 18) and the court of appeals, having

rejected such a characterization (and determined instead that his position was akin to that of a senior partner in a law firm), should have reversed the Tax Court's decision as clearly erroneous.

But the Tax Court's decision did not turn on a finding that petitioner was simply a "usual civil servant." Indeed, it expressly noted that his position was, in fact, analogous to that of a senior partner in a law firm (Pet. App. A-11).[3] This would be the case, to a greater or lesser extent, with respect to virtually any publicly employed supervisor to a governmental law office.

Moreover, as both the Tax Court and the court of appeals concluded, the fact that petitioner's position may be analogous, in certain respects, to that of a senior partner of a law firm does not control as to whether the expenditures in question are ordinary and necessary expenses of the *petitioner's* trade or business of rendering services for

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[3]Implicit in the court's finding that a public defender is analogous to a senior partner is the element of independence. There is accordingly no merit to petitioner's contention (Pet. 16) that a conflict exists between the decision below and state cases declaring the independence of the public defender from the government that pays him. Petitioner's reliance (Pet. 16) on *Ferri* v. *Akerman*, 444 U.S. 193 (1979), is similarly misplaced. In holding that federal law does not immunize court-appointed counsel from malpractice actions by former clients *id.* at 199-204), the Court noted that "the primary office performed by appointed counsel parallels the office of privately retained counsel" (*id.* at 204). But the Court further pointed out (*id.* at 199-200 n.16) that the federal statute there involved provided only for compensating private counsel appointed to represent defendants in federal criminal proceedings, the Congress having rejected a proposal to establish public defender's offices. Moreover, even assuming such an analogy could be drawn between private counsel and a salaried public defender, there is nothing in the Court's opinion that would support the proposition that the independence of such public defender officers requires the allowance of ordinary and necessary business expense deductions to its salaried supervisors or staff members for personal expenditures voluntarily made by them on behalf of the office itself.

compensation. Whatever similarities there may otherwise be between petitioner's office and that of a private law firm, such similarities cease upon an examination of the underlying purpose of the expenditures in question. In the case of a private firm, such expenditures would be intended to inure to the ultimate economic benefit of the individual partners as a result of the enhanced probability that the firm would continue to prosper. But it does not follow that similar expenditures would be deductible in the circumstances of this case where there is no indication in the record that the business conducted at the luncheons and dinners served, in any way, to advance petitioner's own business of rendering services for compensation. Since they were not ordinary and necessary expenses of that business, petitioner cannot deduct them.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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DECEMBER 1980